

ILLINOIS POLLUTION CONTROL BOARD
October 18, 2012

IN THE MATTER OF:)
)
PETITION OF EXELON GENERATION,) AS 13-1
LLC, UNDER 35 ILL. ADM. CODE) (Adjusted Standard – Water)
304.141(c) FOR ALTERNATIVE THERMAL)
STANDARDS, QUAD CITIES NUCLEAR)
GENERATING STATION)

ORDER OF THE BOARD (by C.K. Zalewski):

This order responds to a September 20, 2012 petition for adjusted thermal standards filed by Exelon Generation, LLC (Exelon).¹ The petition was accompanied by a motion for procedural guidance concerning the request, in which the Illinois Environmental Protection Agency (Agency or Illinois EPA) joined. The Board appreciates the parties' uncertainty as to how to proceed. This order describes the procedural options the Board sees as available under its existing rules.

THE FILINGS

The Petition

On September 20, 2012, Exelon filed a petition seeking alternative thermal standards for the Quad Cities Nuclear Generating Station (Station) under 35 Ill. Adm. Code 304.141(c). Exelon wishes to discharge heated cooling water into the Mississippi at hotter temperatures than currently allowed under 35 Ill. Adm. Code 302.102(b)(8), 302.211(e) and 303.341(e). Such relief is specifically allowed under Section 304.141(c) of the Board's water rules, as authorized by and implementing Section 316(a) of the federal Clean Water Act of 1977 (CWA), codified at 33 USC § 1326.

35 Ill. Adm. Code 304.141(c) provides in its entirety that:

The standards of this Chapter shall apply to thermal discharges unless, after public notice and an opportunity for public hearing, in accordance with Section 316 of the CWA and applicable federal regulations, the Administrator and the Board have determined that different standards shall apply to a particular thermal discharge.

Exelon quotes Section 316(a) of the CWA as follows:

¹ The original petition, captioned differently by Exelon, has been docketed as shown in the caption of this order. The parties are requested to use this caption in any future filings in this docket.

With respect to any point source otherwise subject to the provision of Section 301 or Section 306 of the [Clean Water] Act, whenever the owner or operator of any such source, after opportunity for public hearing, can demonstrate to the satisfaction of the Administrator (or, if appropriate, the State) that any effluent limitation proposed for the control of the thermal component of any discharge from any such source will require effluent limitations more stringent than necessary to assure the protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife in and on the body of water into which the discharges is to be made, the Administrator (or if appropriate, the State) may impose an effluent limitation under such section on such plant, with respect to the thermal component of such discharge (taking into account the interaction with other pollutants), that will assure the protection and propagation of a balanced indigenous population of shellfish, fish and wildlife in and on that body of water. Pet. at 1, citing 33 USC § 1326.

Exelon's petition asserts that the thermal limits that apply to the Quad Cities Station are more stringent than necessary to assure the protection and propagation of a balanced, indigenous population (BIP) of shellfish, fish and wildlife in the receiving waters of the Station's discharge, namely Pool 14 of the Mississippi River. Pet. at 2. Exelon proposes alternative thermal standards in its petition. Pet. at 7-8. Three technical documents accompany the petition as exhibits: a Section 316(a) Demonstration (Exh. 1), a Habitat Conservation Plan (Exh. 2), and Exelon's federal fish and wildlife permit issued under 50 CFR 17.22 for "Native Endangered Species Habitat Conservation Plan – E Wildlife" (Exh. 3).

Exelon's petition, which bore a suggested "PCB" docket number, suggested that

neither [Section] 304.141(c) nor other Board rules specify the procedures for conducting proceedings pursuant to that Section. Nor do the Board's rules governing regulatory relief mechanisms (e.g., variance or adjusted standards) or regulatory proceedings that involve thermal discharges (e.g., heated effluent or artificial cooling lake demonstrations) provide a useful model for conducting proceedings under [Section] 304.141(c) and Section 316 (a) [of the federal Clean Water Act]. Pet. at 3 (n. 2 below in original).

Exelon states in its original n. 2 at p. 3-4,

For example, the rules governing variances require hearings and a showing that the petitioner is taking steps to come into compliance with the requirement from which the variance is sought. Adjusted standards require showings regarding a number of factors (such as cost considerations) that are not relevant to obtaining [federal] 316(a) relief. Similarly, heated effluent and artificial cooling lake demonstrations require hearings and provide for of (sic) a one-time showing, that is not subject to be review (sic) in connection with NPDES permit renewals.

The Joint Motion for Procedural Order

The petition was accompanied by a “Joint Motion for Procedural Order Regarding Conduct of Proceedings to Seek Approval of Alternate Thermal Standards” (Jt. Mot.). In addition to Exelon, the other movant was the Agency. The Joint Motion repeats the petition’s recitation of the deficiencies of various existing procedural mechanisms. Jt. Mot. at 1-2. Additionally, the Joint Motion states that:

According to the USEPA [United States Environmental Protection Agency], alternate thermal standards granted under Section 316(a) are tied to the NPDES [National Pollutant Discharge Elimination System] Permit for the facility, and, therefore, the alternative thermal standards are subject to review and renewal with each NPDES for the facility, and therefore, the alternative thermal standards are subject to review and renewal with each NPDES permit renewal. *Id.* at 2.

Section 301.141(c) does not specify the procedures that govern the conduct of proceedings before the Board to obtain alternate thermal standards under Section 316(a). Nor are the provisions that govern other Board regulatory relief mechanisms (*e.g.* variances or adjusted standards) or regulatory proceedings that involve thermal discharges (*e.g.*, heated effluent or artificial cooling lake demonstrations) directly applicable to the proceedings under 304.141(c) and 316(a). More specifically, in contrast to relief authorized under 316(a), the Board’s variance determinations are intended to provide only temporary relief while the applicant implements measures to attain compliance with generally applicable requirements. Likewise, in contrast to USEPA’s interpretation that 316(a) standards require reevaluations with each NPDES permit renewal, *the Board’s adjusted standard and heated effluent and artificial cooling lake regulations provide for one-time determinations that are not subject to periodic review.* Jt. Mot. at 2, emphasis added.

The Joint Motion requests that the Board identify the procedures that will govern the proceedings before the Board to consider Exelon’s petition, stating

Exelon and Illinois EPA submit that the Board’s General Rules (35 Ill. Adm. Code Part 101) provide procedural rules that are sufficient and compatible with proceedings under Section 304.141(c). Exelon and Illinois EPA request that the Board order that parties to this proceeding be required to comply with the following procedural rules: (1) filing and service of petitions (Part 101 Subpart C); (2) designation of Illinois EPA as a party in interest (Section 101.404); (3) notice to the public of opportunity for a hearing (Section 101.602); and (4) the conduct of hearings, if hearings are conducted (Subpart F). Jt. Mot. at 2-3.

BOARD DISCUSSION

When presented with the petition for filing by petitioner's messenger, the Clerk's Office must determine the nature of the proceeding and whether or not a \$75 filing fee is required under Section 101.302(e). Given the nature of the relief requested, listed on the petition as "alternative thermal standards," Clerk's Office options included either "site specific regulation" or "adjusted standard." To avoid delaying petitioner's messenger, the Clerk's Office docketed the petition as an adjusted standard, based on the "PCB" designation on the petition as indicative of petitioner's apparent desire to have the petition treated as an adjudicatory case. That initial designation, obviously, is not binding on the parties or the Board.

Petitioner has requested, for its own Station only, a set of thermal standards different from those generally applicable thermal standards. For the reasons discussed below, the Board finds that that the Board is empowered to grant the requested relief under the Environmental Protection Act (Act) 415, ILCS 5/1 *et seq.* But, the Board does not believe that, *without a prior rulemaking process*, the Board can create a specific procedure for proceedings under Section 304.141(c) comparable to other specific procedures in Part 106 or as established in its Part 106 procedural rules.

As Exelon and the Agency's joint motion notes, the Board currently does not have specific procedural rules covering proceedings under 35 Ill. Adm. Code 304.141(c) in its Part 106 procedural rules. Section 26 of the Act grants the Board authority to "adopt such procedural rules as may be necessary to accomplish the purposes of the Act. In adopting such rules the Board shall follow the rulemaking procedures of the Illinois Administrative Procedure Act [APA, 5 ILCS *et seq.*]" 415 ILCS 5/26 (2010). The Board's last comprehensive review of its procedural rules was completed on December 21, 2000. *See* Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130, R00-20 (Dec. 21, 2000), completing the work begun in the predecessor docket Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130, R97-08 (closed Mar. 16, 2000).

Section 101.100(a), entitled "Applicability," states that the Part 101 rules "should be read in conjunction with procedural rules for the Board's specific processes, found at 35 Ill. Adm. Code 102 through 130, and the Board's Administrative Rules, found at 2 Ill. Adm. Code 2175". 35 Ill. 101.100 (a). The Board would certainly entertain a proposal to add a new subpart to its Part 106 procedural rules for CWA Section 316(a) adjudicatory procedures, or alternatively, a proposal to amend Section 301.141 (c) of the water rules to provide a standard for decision and procedural requirements as allowed under Section 28.1(b) of the Act.

The Joint Motion suggests that the applicable procedural rules from 35 Ill. Adm. Code 101 *et seq.* should be limited to: petition filing and service requirements (Part 101.Subpart C; designation of the Agency as a party in interest under order Section 101.404), notice to the public of opportunity for hearing (Section 101.602) and conduct of hearings (if any) (Part 101.Subpart F). Jt. Mot. at 2-3. The Board finds that these cited sections are not sufficient to address the procedural issues which may arise in this proceeding.

The Board can hear this relief request under its authority to grant adjusted standards in adjudicatory proceedings under Section 28.1(c) of the Act and procedural rules at 35 Ill. Adm. Code Part 104, or as a site specific rulemaking under Section 27 of the Act and the procedural rules at 35 Ill. Adm. Code Part 102.

First, the Board notes that this is not the first Section 304.141(c) petition which it has heard, although it is the first filed since the R00-20 procedural rule update. In 1996, Commonwealth Edison Company (ComEd) filed a petition for alternate thermal standards for its Crawford and Fisk generating stations. Petition of Commonwealth Edison Company for Adjusted Standard from 35 Ill. Adm. Code 302.211(d) and (e), AS 96-10. The Board initially determined that the petition should proceed as an adjusted standard under 35 Ill. Adm. Code 302.211(d) and (e) and follow the procedural rules for a heated effluent demonstration then found in Subpart A of 35 Ill. Adm. Code 106. The Board directed ComEd to file an amended petition. AS 96-10 (June 6, 1996).

ComEd moved the Board for reconsideration of that order. In its order ruling on the reconsideration motion, the Board noted that ComEd had argued that the thermal demonstration procedure of 35 Ill. Adm. Code 106.Subpart A was “inappropriate”. AS 96-10 (June 6, 1996). The Board further noted that

While ComEd believes that an alternate thermal standard pursuant to Section 304.141(c) may be technically different than an adjusted standard, it is willing to follow the procedures of Section 106.Subpart G and has submitted a petition in accordance with Section 106.705. *Id.* at 1.

Under these circumstances, the Board determined that the petition should proceed as an adjusted standard. AS 96-10 (June 20, 1996)².

The relief requested was granted to ComEd as an adjusted standard without a termination date. AS 96-10 (Oct. 3, 1996). Upon the sale of the generating stations from ComEd to Midwest Generation, LLC (Midwest), the Board granted the companies’ joint motion to reopen the docket and “substitute Midwest as the petitioner and holder of the adjusted standard.” AS 96-10 (Mar. 16, 2000)

Next, the Board notes that Exelon and the Agency are incorrect in stating that, “the Board’s adjusted standard and heated effluent and artificial cooling lake regulations provide for *one-time determinations that are not subject to periodic review*”. *Jt. Mot.* at 2 (emphasis added). The Act does not by its terms provide that either adjusted standards or site specific rules are one-time determinations. While petitioners typically present relief requests as requests for Board orders without termination dates, neither Section 28.1 nor Section 27 prevents the Board from including provisions for sunset or reopening of Board orders under specified conditions. The Board has adopted site specific rules with sunset provisions. *See, e.g. Petition for Site-Specific Exception to Effluent Standards for the East St. Louis Water Treatment Plant by the Illinois*

² The petitioner did not raise, and the Board did not address, the issue of whether a rulemaking would be an appropriate procedural mechanism for obtaining the relief requested.

American Water Company, R 85-11 (Feb. 2, 1989) (3-year), and has adopted limited adjusted standards. Petition of Noveon, Inc. for an Adjusted Standard from 35 Ill. Adm. Code 304.122, AS 2002-5 (Nov. 4, 2004) (7 year). The Agency or the entity seeking alternative standards in whatever proceeding may suggest relief of any desirable duration, and then present evidence and arguments in support of the suggestion.

The site specific rulemaking procedures may allow the Board greater flexibility in making decisions. The rulemaking provision of Section 27(a) by its terms allows the Board to adopt substantive regulations to “make different provisions as required by circumstances for different contaminant sources and for different geographical areas.” *See* 415 ILCS 5/27(a). These “may include regulations specific to individual persons or sites.” *Id.*

On the other hand, the Board also acknowledges that some sources prefer to seek site specific relief by way of the adjusted standard’s adjudicatory proceeding. Some believe that a petition may be processed more quickly in an adjudicatory proceeding since hearing is not specifically required by Section 28.1, whereas at least one hearing is required under Section 27(a). Additionally, Section 27(b) of the Act requires the Board to request the Department of Commerce and Economic Opportunity (DCEO) to perform an Economic Impact Study (EcIS).

It has been the Board’s experience in recent years that DCEO has rarely chosen to perform a study, and that site specific rulemakings can be completed quite expeditiously if the parties are prepared to proceed to hearing upon the filing of a petition. Additionally, based on the materials Exelon has already presented to the Board, the Board on its own motion finds that a hearing on the alternative thermal standards is desirable, even should this proceed as an adjudicatory case.

On or before December 19, 2012, if Exelon chooses to have this matter proceed as an adjusted standard, it must file an amended petition fulfilling the procedural requirements of Section 28.1 of the Act and the Board’s procedural rules at 35 Ill. Adm. Code 104.Subpart D. When filing any amended petition, Exelon need not re-file the exhibits to the current petition. If Exelon does not wish this matter to proceed as an adjusted standard, it may do nothing and the Board will dismiss this proceeding as a matter of course.

If Exelon instead wishes to have this matter proceed as a regulatory proceeding, Exelon should file a regulatory proposal meeting the requirements of Sections 27-28 of the Act and the Board’s procedural rules at 35 Ill. Adm. Code 102. To facilitate any such request, as it has occasionally done previously for larger entities and municipalities, the Board hereby waives the 200-signature requirement of Section 28 of the Act and 35 Ill. Adm. Code 102.410(b). *See, e.g.* Ameren Ashpond Closure Rules (Hutsonville Power Station): Proposed 35 Ill. Adm. Code 840.101 through 840.152, R09-21 (June 18, 2009) and City of Galva Site Specific Water Quality Standard for Boron Discharges to Edwards River and Mud Run Creek: 35 Ill. Adm. Code 303.447 and 303.448, R09-11 (Feb. 5, 2009). Exelon need not re-file the exhibits to the current petition, provided that it seeks incorporation of the AS 13-1 record into any new rulemaking docket under 35 Ill. Adm. Code 101.306. Should Exelon decide to file a rulemaking petition, the Board will close this adjusted standard docket on its own motion.

Finally, Exelon and the Agency may seek clarification of this order if the Board has not adequately addressed any concern not articulated in prior filings.

IT IS SO ORDERED.

Chairman T.A. Holbrook abstained.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 18, 2012, by a vote of 3-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish at the end.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board